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No. 83-87

In The
Supreme Court of the United States
October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX, AND BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent, JESSE A. VAIL, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 19, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit may be found at 706 F. 2d 1435 (7th Cir., 1983). It may also be found in Petitioners' Appendix at pages 1-42. The Opinion of the United States District Court for the Central District of Illinois, Danville Division, is included in Petitioners' Appendix as Exhibit "B" at pages 43-49.

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RESPONDENT'S STATEMENT OF THE CASE

Respondent is dissatisfied with the Petitioners' Statement of the Case due to its inaccuracies, omissions, and particularly, its argumentative content. Respondent objects to the portion of the Petitioners' Statement (Petition, pp. 3-4) which argues and interprets the meaning of the Illinois School Code. The bald-faced conclusion that "a teacher without tenure is, in essence, an at-will employee of the School Board under Illinois law" (Petition, p. 3) is in direct contradiction to the findings and evidence presented below. In the interest of clarity and fairness, Respondent shall restate in simple form the facts material to the issues in the Petition.

Under Illinois' School Code, a public school teacher cannot acquire tenure until at least two (2) years of full-time, consecutive year-to-year employment. Ill. Rev. Stats. (1981), Chapter 122, Section 24-11. Once having acquired tenure, a teacher cannot be discharged except for cause upon specific charges and pursuant to certain procedures. *Id.*, Section 24-12.

According to the findings of fact in the case at bar, the Petitioner School Board offered the Respondent a two (2) year probationary term after Respondent, in preliminary discussions, expressed concern regarding the length of his proposed employment. The Board's specific assurance was that Respondent would sign a one (1) year written contract which would be renewed for an additional year. Respondent accepted this offer, left his residence in Joliet, Illinois, where he and his family had lived for thirteen (13) years, left a job he had held for ten (10) years, and took a salary cut to assume the position in Paris.

During Respondent's first year of employment, the Board met and voted not to renew his contract for the following year. No hearing or reasons for the non-renewal were given to Respondent.

The Respondent brought this action in Federal District Court, alleging that the decision to terminate him without stated cause or hearing during his two (2) year term of employment violated his Constitutional right to due process. The District Court found "that the Board made a commitment to the Plaintiff to extend his contract for a second year if he would accept the job in Paris" (Petitioner's Appendix [hereafter "Petition Apdx."] 46). It found that the Plaintiff had a two (2) year "contract" (Petition Apdx. 46) which constituted a "property interest" of which the Plaintiff was deprived by actions of the Board taken "under the color of state law" (Petition Apdx. 48). Stipulated damages were awarded.

On appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's decision, with one Judge

dissenting, finding that there was an implied two (2) year contract between the Respondent and the Board, enforceable under Illinois law. With respect to the necessity that such an enforceable contract exist, the majority of the Court of Appeals observed that this was not a prerequisite to establishment of a protected property interest under federal law.

REASONS FOR DENYING THE WRIT

I.

The Decision Of The Court Of Appeals For The Seventh Circuit Is Consistent With Prior Supreme Court Decisions.

Petitioners' contention that the Court of Appeals for the Seventh Circuit "misread" and chose "to ignore" (Petition, p. 6) applicable decisions of the Supreme Court does not survive analysis of the Supreme Court's decisions in *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Petitioners' contention stems from their admitted interpretation of *Roth* in its "broadest sense" (Petition, p. 6), and *Sindermann* in the narrowest possible sense.

Respondent rejects Petitioners' interpretation of these landmark cases in due process, but rather adopts the interpretation of these cases included in the Seventh Circuit's opinion in this case. *Vail v. Board of Education of Paris Union School District No. 95, et al.*, 706 F. 2d 1435 (7th

Cir., 1983) (also found in Petitioners' Appendix at pp. 1-42). As explained therein, *Roth* held that:

> ". . . a teacher terminated after one year had no property interest in his continued employment where his unilateral expectations had no basis in statute, contract, or mutually explicit understanding with the University. (citation to *Roth*, 408 U. S. at 578)". *Vail*, 706 F. 2d at 1437, Petition Apdx. 3.

Unlike *Roth*, a property interest was found in *Sindermann*, which held that a legitimate claim of continued employment:

> ". . . had been fostered by the rules and the policy of the University, despite the lack of tenure or a contractual provision. (Citation to *Sindermann*, 408 U. S. at 599-601)". *Id.*, Petition Apdx. 3-4.

These companion cases are analyzed and discussed in great detail by the Court of Appeals for the Seventh Circuit.

In applying the teachings of *Roth* and *Sindermann* to the case at bar, the Seventh Circuit noted that this case involves a *mutually explicit understanding* between the Respondent and the Petitioners (School Board) that he would be employed for the maximum probationary term of two (2) years. His expectation of continued employment for two (2) years was not merely subjective or unilateral. As in *Sindermann*, Respondent's claim of continued employment was fostered by actions of state officials. In fact, in the case at bar, these actions consisted of explicit promises from the highest governing authorities.

The gist of Petitioners' argument is that the *Sindermann* Court "attached special meaning to 'tenure'" (Petition, p. 6). They rely entirely on the footnote in *Sindermann* which states that "if (the respondent) has no con-

tractual or other claim to job tenure, the respondent's (due process) claim would be defeated". *Sindermann,* 408 U. S. at 602, n. 7. Conveniently interpreting this language in a vacuum, they imply that *Sindermann* limits school employees' federal property interests to claims of tenure, thereby excluding any other valid contractual or other rights of school employees from protection by due process. In other words, according to Petitioners, such school employees may be deprived of any right but tenure under color of law, no matter its character or value, and have no redress in federal court. As stated by Eschbach, J., concurring in *Vail,* such an interpretation "not only finds no support in the (*Sindermann*) opinion, but is plainly inconsistent with it". 706 F. 2d at 1444 (Petition Apdx. 17).

The *Sindermann* Court required legitimate claims to tenure before finding a "property" interest because tenure is what Sindermann claimed he had. As stated by Judge Eschbach: ". . . *Sindermann* indeed uses the term tenure—it would be awkward to use another word in discussing Sindermann's claim that he had tenure". *Id.* The *Sindermann* Court did not state or even imply that, in academic employment, claims of tenure are the only interests that could rise to the level of "property" interests under due process. Such a limitation finds no support in logic, or this Court's language. The *Sindermann* opinion made clear that such property interests "are not limited by a few rigid, technical forms". 408 U. S. at 601.

After interpreting *Sindermann* as holding that any claim of continued employment must be based on statutory tenure, Petitioners absurdly conclude that even a "contract right to continued employment can never rise to the

level of a property interest protected by the Fourteenth Amendment when viewed within the framework of a statutory tenure system". (Petition, p. 7) *Sindermann* did not even involve a formal statutory tenure scheme. See 408 U. S. at 600-602. Petitioners' argument on this point falls of its own weight.

II.

The Decision Of The Court Of Appeals For The Seventh Circuit Does Not Conflict With Any Decisions Of Other Federal Courts Of Appeal On The Same Matter.

Petitioners argue that the Opinion below is inconsistent with the Sixth Circuit's Opinion in *Ryan v. Aurora City Board of Education*, 540 F. 2d 222 (6th Cir., 1976), contending that *Ryan* is "virtually indistinguishable" from the instant case. Such is not the case. In the first place, *Ryan* is distinguishable on its facts. Secondly, the Sixth Circuit has ruled consistently on the very issue which Petitioners frame in the instant case.

Ryan is clearly and easily distinguishable from the case at bar. Unlike the case at bar, where the Respondent was terminated without stated cause or hearing *during* his term of employment, the Plaintiffs in *Ryan* were simply not rehired at the *conclusion* of their terms of employment. In addition, a contrary ruling in *Ryan* would have effectively overridden Ohio's statutory tenure system. For description see *Ryan*, 540 F. 2d at 224. In the case at bar, the Respondent did not claim that he had tenure at the end of a term of employment. He only claimed a property interest in completing the second year of his probationary employment as promised by the Pe-

titioners. Neither their promise nor his right to complete his limited term of employment would have infringed on the Illinois statutory tenure scheme, which grants tenure upon entering a third continuous year of employment. Ill. Rev. Stat. (1981) Chapter 122, Section 24-11.

As in their interpretation of *Sindermann*, Petitioners quote and rely on certain language in the *Ryan* opinion in a vacuum and entirely out of context (Petition, p. 8). Ryan, like Sindermann, and unlike Respondent, claimed that he had a right to indefinite continued employment, i. e., tenure. The *Ryan* language quoted by Petitioners that he (Ryan) could not have a legitimate claim to "continued employment" in the face of a statutory tenure system (540 F. 2d at 227) refers to a claim of *indefinite* continued employment (i. e., tenure), not a *limited* term of employment such as was claimed by Respondent herein.

Further indication that the Seventh Circuit's *Vail* decision does not conflict with opinions of the Sixth Circuit is the Sixth Circuit's holding in *Soni v. Board of Trustees of the University of Tennessee*, 513 F. 2d 347 (6th Cir., 1975). In *Soni*, the Sixth Circuit ruled on the very issue which Petitioners frame in the instant case: whether an academic employee can ever have a legitimate claim of continued employment on some basis other than an existing statutory tenure system. The facts in *Soni* showed that the parties had a "viable understanding" that the Plaintiff would have continued employment with the University despite state law and university regulations which prohibited an alien from obtaining statutory tenure. *Id.* at 351. In answering the question, the Sixth Circuit held that the "understanding" of the parties was sufficient to constitute a "property" right under due process, not-

withstanding the existence of a statutory tenure system. *Id.* at 350-1. *Soni* was distinguished in *Ryan* and relied on by the majority Opinion below (at 706 F. 2d at 1440; Petition Apdx. 9). *Soni* demonstrates conclusively that the positions of the Sixth and Seventh Circuits are not inconsistent on the issues resolved below.

III.

There Is A Federal Interest In This Case Under 42 U. S. C. Section 1983—The Existence Of A Remedy For Breach Of Contract Under State Law Does Not Preclude Existence Of A Property Right Under Federal Law.

The Petitioners argue (Petition, pp. 8-9) that an adequate remedy at law for a breach of contract in a state court somehow precludes existence of a federal interest under 42 U. S. C. Section 1983. Such is not the case, and no authorities are cited for this unfounded conclusion.

Instead of authority and argument, Petitioners raise the specter of this single case opening "the floodgates of a new wave of litigation under 42 U. S. C. Section 1983" (Petition, p. 9). This emotional appeal grossly overstates the significance of the decision below. Judge Eschbach, in his concurring opinion below, notes that this case is consistent with the 1972 decision of the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515,* 471 F. 2d 488, and that there has been "no deluge of Section 1983 cases such as this since our decision in *Hostrop,* nor is that surprising" (706 F. 2d at 1449, Petition Apdx. 27). The reason why no such deluge has resulted from precedents such as *Hostrop, Soni* and the case at bar is obvious: "States have been on notice . . . that before dis-

charging a state employee in Vail's position, they must give the employee a meaningful opportunity to be heard." Eschbach, J., concurring opinion, *Vail*. Id. If, as Petitioners argue, the distinction between probationary and tenured employment status is "diluated" in this case, it is only because they, as governing state authorities, chose to bind themselves to the Respondent in a different manner than the usual year-to-year probationary employee, and after he relied on their promise, they chose to renege.

IV.

The Court Of Appeals' Interpretation Of The Illinois School Code Is Not Inconsistent With Any Controlling Decisions Of The Illinois Supreme Court.

The Illinois School Code does not specifically address the issue of school board authority to offer a two-year probationary term, such as was offered in this case. Further, Petitioners admit that the Illinois Supreme Court has never decided the issue (Petition, p. 10). The Seventh Circuit found in its Opinion that Section 24-11 of the Code contemplates just such a two-year probationary period as was promised to Respondent. It even suggested this interpretation of the Illinois School Code in the *Hostrop* case in 1972, and also suggested that the cause of action for violation of civil rights would exist even if Illinois law only permitted a one-year contract. (706 F. 2d at 1439; Petition Apdx. 8.)

Notwithstanding the Court of Appeals' ruling that the lack of an enforceable contract under state law would not preclude the establishment of a protected prop-

erty interest (706 F. 2d at 1440; Petition Apdx. 9), Petitioners choose to argue that any such two (2) year contract would be unenforceable under state law, based on Petitioners' interpretation of the Illinois School Code. The Petitioners' argument as to legislative intent, based on their interpretation of several different provisions of the School Code, was rejected by the Seventh Circuit. This argument, along with Respondent's argument, was thoroughly briefed and argued below. Suffice it to say that Respondent argued, and the Court of Appeals found (706 F. 2d at 1439; Petition Apdx. 6-7) that the Illinois School Code did *not* preclude the School Board from binding itself to a two-year contract with the Respondent.

In any event, the question of whether the Seventh Circuit properly interpreted the Illinois School Code in the absence of express applicable provisions or binding rulings of the Illinois Supreme Court is no basis for granting review on writ of certiorari.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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